

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TINA A. ATWELL and ASHLEY ATWELL,	:	
a minor by her next friend, TINA A. ATWELL,:		C.A. No. 02C-12-003WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
RHIS, INC. d/b/a RELIABLE HOME	:	
INSPECTION SERVICE, a Delaware	:	
corporation, and RICHARD DAVIS.	:	
	:	
Defendants.	:	

Submitted: March 10, 2006

Decided: August 18, 2006

ORDER

Upon Defendant Richard Davis' Motion to Dismiss.

Granted in part; Denied in part.

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware and Marry F. Higgins, Esquire, Odessa, Delaware; co-counsel for Plaintiffs.

Robert K. Pearce, Esquire of Ferry Joseph & Pearce, P.A., Wilmington, Delaware; attorneys for Defendant Richard Davis.

Norman H. Brooks, Esquire of Marks O'Neill O'Brien & Courtney, P.C., Wilmington, Delaware; attorneys for Defendant RHIS.

WITHAM, R.J.

Defendant, Mr. Davis, filed a motion to dismiss alleging that this Court lacks subject matter jurisdiction over Counts III and IX¹ because they allege negligent misrepresentation and the Court of Chancery has exclusive jurisdiction over that particular cause of action, unless it is pled under the Consumer Fraud Act. Plaintiffs, Tina and Ashley Atwell, argue that this Court does have jurisdiction because in *Guardian Construction v. Tetra Tech Richardson, Inc.*,² this Court accepted jurisdiction over a negligent misrepresentation action and adopted Section 552 of the Restatement (Second) of Torts, which says, “[o]ne who, in the course of his business, professional employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”

For the reasons set forth below, Defendant’s Motion to Dismiss is *granted* in

¹Count III says, in relevant part, “34. Defendant Davis, knew, or should have known, that there were problems with moisture build-up as a result of the broken furnace and heating system at the time he completed the Disclosure form. 35. Defendant Davis negligently failed to disclose to Plaintiff the true condition of the home and that he had numerous problems in the past that required repair of the home due to the formation of mold as a result of humidity build-up.”

Count IX says, in pertinent part, “51. In the face of their pecuniary duties to provide accurate information, the Seller, Defendant Davis . . . failed to exercise reasonable care in obtaining and communicating false and inaccurate information supplied to the Plaintiffs. As a result, the actions of Defendant Davis . . . have caused the Plaintiffs to suffer injuries and damages as set forth herein above.”

²583 A.2d 1378 (Del. Super. 1990).

part and *denied* in part.

Discussion

Defendant Davis suggests that Counts III and IX of Plaintiffs' Complaint allege negligent misrepresentation, jurisdiction over which is held by the Court of Chancery. Thus, he seeks to have the Counts dismissed.

In Count III, the Plaintiffs allege that Defendant Davis negligently failed to disclose the true condition of the home. To assert a claim for negligent misrepresentation, the following elements must be present: (1) a pecuniary duty to provide accurate information, (2) the supplying of false information, (3) failure to exercise reasonable care in obtaining or communicating information, and (4) a pecuniary loss caused by justifiable reliance upon the false information.³

Here, I find that Count III was alleging negligence, not negligent misrepresentation. This finding is based on two considerations. First, Count IX, which will be discussed shortly, is clearly asserting a negligent misrepresentation claim and does not resemble Count III. Second, pleading a cause of action in negligence requires that "a defendant must be put on notice of what duty was breached, who breached it, the breaching act, and the party upon whom the act was performed,"⁴ which is what Count III accomplishes. Specifically, Count III establishes the duty (that a seller must disclose known defects), who breached it

³See *Outdoor Technologies, Inc. v. Allfirst Fin., Inc.*, 2001 WL 541472 (Del. Super.).

⁴*Anderson v. Airco, Inc.*, 2004 WL 1551484 (Del. Super.).

(Defendant Davis), the breaching act (failing to disclose the condition of the home), and the injured party (Plaintiffs). Thus, Count III is permitted to stand.

As for Count IX, Plaintiffs expressly contend that there was a pecuniary duty to provide accurate information, that Defendant Davis failed to exercise reasonable care in obtaining and communicating false and inaccurate information to Plaintiffs and that Plaintiffs suffered injuries and damages as a result. Based on these allegations, I conclude that Plaintiffs were asserting a claim for negligent misrepresentation. Therefore, I must now decide whether this Court has jurisdiction over such a claim.

In *FA, Inc. v. Equipment Leasing Associates*,⁵ the court held, “[t]his Court has subject matter jurisdiction over a claim of negligent misrepresentation when the claim is in the context of the Consumer Fraud Act. That is not the assertion here. The motion to dismiss the claim of negligent misrepresentation is GRANTED.” As in that case, Plaintiffs here do not allege negligent misrepresentation under the Consumer Fraud Act. Also, in *Mark Fox Group, Inc. v. E.I. DuPont de Nemours & Company*,⁶ the Court of Chancery opined, “[i]n addition to developing the concept of claims for negligent or innocent misrepresentation, the Court of Chancery has retained exclusive, rather than concurrent, jurisdiction over such causes of action.”

Plaintiffs cited to case law wherein the Superior Court addressed the issue of

⁵2005 WL 3436605, *1 (Del. Super.).

⁶2003 WL 21524886, *5 (Del. Ch.).

Atwell v. RHIS, et al.
C.A. No. 02C-12-003 WLW
August 18, 2006

negligent misrepresentation. However, those cases are distinguishable. First, the cases that Plaintiffs cite do not make statements specifically retaining jurisdiction over negligent misrepresentation in this Court. In *Ruger v. Funk*,⁷ this Court explained, “[r]ecently, however, this Court has broaden [sic] liability for negligence [sic] misrepresentation and adopted Section 552 of the Restatement (Second) of Torts (1977).” In *Guardian*, this Court addressed the issue of negligent misrepresentation and adopted Section 552 in terms of the privity requirement of negligent misrepresentation.⁸ Additionally, *FA, Inc.* and *Mark Fox Group* were decided more recently. Consequently, I find that *FA, Inc.* and *Mark Fox Group* are controlling and will deny jurisdiction as to Count IX. However, Plaintiffs are free to seek transfer pursuant to 10 *Del. C.* §1902.

Based on the foregoing, Defendant’s Motion to Dismiss is *granted* in part and *denied* in part. IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

⁷1996 Del. Super. LEXIS 34, *32.

⁸583 A.2d 1378.